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12 United States of America

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14 UNITED STATES DISTRICT COURT  
15 SOUTHERN DISTRICT OF CALIFORNIA

16 MARIO ABELA-MCCANN, an individual,) Case No. 08cv1047H (AJB)  
17 Plaintiff, )  
18 v. ) ANSWER TO COMPLAINT BY THE  
19 UNITED STATES OF AMERICA , ) UNITED STATES OF AMERICA  
20 a Federal Government Entity, )  
21 Defendant. )  
22

23 COMES NOW the Defendant, by and through its counsel, Karen P. Hewitt, United States  
24 Attorney, and David B. Wallace, Assistant United States Attorney, and in answer to Plaintiff's  
25 Complaint, set forth the following:

26 1. Answering Paragraph 1 of the complaint, defendant affirmatively alleges that said  
27 paragraph contains jurisdictional allegations which present legal conclusions and questions of law to  
28 be determined solely by the court, to which no answer is required. To the extent an answer is required,  
each, all and every allegation contained in said paragraph is denied.

1. Answering Paragraph 2 of the complaint, defendant affirmatively alleges that said  
2. paragraph contains jurisdictional allegations which present legal conclusions and questions of law to  
3. be determined solely by the court, to which no answer is required. To the extent an answer is required,  
each, all and every allegation contained in said paragraph is denied.

4. Answering Paragraph 3 of the complaint, defendant affirmatively alleges that said  
5. paragraph contains venue allegations which present legal conclusions and questions of law to be

1 determined solely by the court, to which no answer is required. To the extent an answer is required,  
2 each, all and every allegation contained in said paragraph is denied.

3       4. Answering Paragraph 4 of the complaint, defendant alleges that no answer is required  
4 to said paragraph inasmuch as there are no charging allegations directed to this answering defendant.  
5 To the extent an answer is required, defendant denies said allegations.

6       5. Answering Paragraph 5 of the complaint, defendant alleges that no answer is required  
7 to said paragraph inasmuch as there are no charging allegations directed to this answering defendant.  
8 To the extent an answer is required, defendant denies said allegations.

9       6. Answering Paragraph 6 of the complaint, defendant alleges that the allegations contained  
10 therein are legal conclusions solely within the purview of the court and for its determination, and no  
11 answer is therefore required. To the extent an answer is required, said allegations are denied.

12       7. Answering Paragraph 7 of the complaint, defendant denies, generally and specifically,  
13 each, all and every allegation contained therein.

14       8. Answering Paragraph 8 of the complaint, defendant alleges that the allegations contained  
15 therein are legal conclusions solely within the purview of the court and for its determination, and no  
16 answer is therefore required. To the extent an answer is required, said allegations are denied.

17       9. Answering Paragraph 9 of the complaint, defendant alleges that it is without knowledge  
18 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
19 thereon, denies generally and specifically each, all and every allegation contained therein.

20       10. Answering Paragraph 10 of the complaint, defendant alleges that the allegations  
21 contained therein are legal conclusions solely within the purview of the court and for its determination,  
22 and no answer is therefore required. To the extent an answer is required, said allegations are denied.

23       11. Answering Paragraph 11 of the complaint, defendant alleges that it is without knowledge  
24 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
25 thereon, denies generally and specifically each, all and every allegation contained therein.

26       12. Answering Paragraph 12 of the complaint, defendant alleges that it is without knowledge  
27 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
28 thereon, denies generally and specifically each, all and every allegation contained therein.

1       13. Answering Paragraph 13 of the complaint, defendant alleges that no answer is required  
2 to said paragraph inasmuch as there are no charging allegations directed to this answering defendant.  
3 To the extent an answer is required, defendant denies said allegations.

4       14. Answering Paragraph 14 of the complaint, defendant alleges that no answer is required  
5 to said paragraph inasmuch as there are no charging allegations directed to this answering defendant.  
6 To the extent an answer is required, defendant denies said allegations.

7       15. Answering Paragraph 15 of the complaint, defendant alleges that it is without knowledge  
8 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
9 thereon, denies generally and specifically each, all and every allegation contained therein.

10       16. Answering Paragraph 16 of the complaint, defendant alleges that it is without knowledge  
11 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
12 thereon, denies generally and specifically each, all and every allegation contained therein.

13       17. Answering Paragraph 17 of the complaint, defendant alleges that it is without knowledge  
14 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
15 thereon, denies generally and specifically each, all and every allegation contained therein.

16       18. Answering Paragraph 18 of the complaint, defendant alleges that it is without knowledge  
17 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
18 thereon, denies generally and specifically each, all and every allegation contained therein.

19       19. Answering Paragraph 19 of the complaint, defendant denies, generally and specifically,  
20 each, all and every allegation contained therein.

21       20. Answering Paragraph 20 of the complaint, defendant denies, generally and specifically,  
22 each, all and every allegation contained therein.

23       21. Answering Paragraph 21 of the complaint, defendant denies, generally and specifically,  
24 each, all and every allegation contained therein.

25       22. Answering Paragraph 22 of the complaint, defendant denies, generally and specifically,  
26 each, all and every allegation contained therein.

27

28

1       23. Answering Paragraph 23 of the complaint, defendant realleges Paragraphs 1 to 22 of its  
2 answers to Paragraphs 1 to 22 of plaintiff's compliant, and by this reference incorporates them herein  
3 as though set forth in full.

4       24. Answering Paragraph 24 of the complaint, defendant denies, generally and specifically,  
5 each, all and every allegation contained therein.

6       25. Answering Paragraph 25 of the complaint, defendant denies, generally and specifically,  
7 each, all and every allegation contained therein.

8       26. Answering Paragraph 26 of the complaint, defendant alleges that it is without knowledge  
9 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
10 thereon, denies generally and specifically each, all and every allegation contained therein.

11       27. Answering Paragraph 27 of the complaint, defendant alleges that it is without knowledge  
12 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
13 thereon, denies generally and specifically each, all and every allegation contained therein.

14       28. Answering Paragraph 28 of the complaint, defendant realleges Paragraphs 1 to 27 of its  
15 answers to Paragraphs 1 to 27 of plaintiff's compliant, and by this reference incorporates them herein  
16 as though set forth in full.

17       29. Answering Paragraph 29 of the complaint, defendant denies, generally and specifically,  
18 each, all and every allegation contained therein.

19       30. Answering Paragraph 30 of the complaint, defendant denies, generally and specifically,  
20 each, all and every allegation contained therein.

21       31. Answering Paragraph 31 of the complaint, defendant denies, generally and specifically,  
22 each, all and every allegation contained therein.

23       32. Answering Paragraph 32 of the complaint, defendant alleges that it is without knowledge  
24 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
25 thereon, denies generally and specifically each, all and every allegation contained therein.

26       33. Answering Paragraph 33 of the complaint, defendant realleges Paragraphs 1 to 32 of its  
27 answers to Paragraphs 1 to 32 of plaintiff's compliant, and by this reference incorporates them herein  
28 as though set forth in full.

1       34. Answering Paragraph 34 of the complaint, defendant denies, generally and specifically,  
2 each, all and every allegation contained therein.

3       35. Answering Paragraph 35 of the complaint, defendant denies, generally and specifically,  
4 each, all and every allegation contained therein.

5       36. Answering Paragraph 36 of the complaint, defendant alleges that it is without knowledge  
6 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
7 thereon, denies generally and specifically each, all and every allegation contained therein.

8       37. Answering Paragraph 37 of the complaint, defendant realleges Paragraphs 1 to 36 of its  
9 answers to Paragraphs 1 to 36 of plaintiff's compliant, and by this reference incorporates them herein  
10 as though set forth in full.

11       38. Answering Paragraph 38 of the complaint, defendant denies, generally and specifically,  
12 each, all and every allegation contained therein.

13       39. Answering Paragraph 39 of the complaint, defendant alleges that it is without knowledge  
14 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
15 thereon, denies generally and specifically each, all and every allegation contained therein.

16       40. Answering Paragraph 40 of the complaint, defendant realleges Paragraphs 1 to 39 of its  
17 answers to Paragraphs 1 to 39 of plaintiff's compliant, and by this reference incorporates them herein  
18 as though set forth in full.

19       41. Answering Paragraph 41 of the complaint, defendant denies, generally and specifically,  
20 each, all and every allegation contained therein.

21       42. Answering Paragraph 42 of the complaint, defendant denies, generally and specifically,  
22 each, all and every allegation contained therein.

23       43. Answering Paragraph 43 of the complaint, defendant alleges that it is without knowledge  
24 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
25 thereon, denies generally and specifically each, all and every allegation contained therein.

26       44. Answering Paragraph 44 of the complaint, defendant realleges Paragraphs 1 to 43 of its  
27 answers to Paragraphs 1 to 43 of plaintiff's compliant, and by this reference incorporates them herein  
28 as though set forth in full.

1       45. Answering Paragraph 45 of the complaint, defendant denies, generally and specifically,  
2 each, all and every allegation contained therein.

3       46. Answering Paragraph 46 of the complaint, defendant denies, generally and specifically,  
4 each, all and every allegation contained therein.

5       47. Answering Paragraph 47 of the complaint, defendant alleges that it is without knowledge  
6 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
7 thereon, denies generally and specifically each, all and every allegation contained therein.

8       48. Answering Paragraph 48 of the complaint, defendant alleges that it is without knowledge  
9 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
10 thereon, denies generally and specifically each, all and every allegation contained therein.

11       49. Answering Paragraph 49 of the complaint, defendant alleges that it is without knowledge  
12 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
13 thereon, denies generally and specifically each, all and every allegation contained therein.

14       50. Answering Paragraph 50 of the complaint, defendant alleges that the allegations  
15 contained therein are legal conclusions solely within the purview of the court and for its determination,  
16 and no answer is therefore required. To the extent an answer is required, said allegations are denied.

17       51. Answering Paragraph 51 of the complaint, defendant denies, generally and specifically,  
18 each, all and every allegation contained therein.

19       52. Answering Paragraph 52 of the complaint, defendant denies, generally and specifically,  
20 each, all and every allegation contained therein.

21       53. Answering Paragraph 53 of the complaint, defendant denies, generally and specifically,  
22 each, all and every allegation contained therein.

23       54. Answering Paragraph 54 of the complaint, defendant alleges that it is without knowledge  
24 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
25 thereon, denies generally and specifically each, all and every allegation contained therein.

26       55. Answering Paragraph 55 of the complaint, defendant realleges Paragraphs 1 to 54 of its  
27 answers to Paragraphs 1 to 54 of plaintiff's compliant, and by this reference incorporates them herein  
28 as though set forth in full.

1       56. Answering Paragraph 56 of the complaint, defendant denies, generally and specifically,  
2 each, all and every allegation contained therein.

3       57. Answering Paragraph 57 of the complaint, defendant denies, generally and specifically,  
4 each, all and every allegation contained therein.

5       58. Answering Paragraph 58 of the complaint, defendant alleges that it is without knowledge  
6 or information sufficient to form a belief as to the truth of the allegations therein contained, and based  
7 thereon, denies generally and specifically each, all and every allegation contained therein.

## AFFIRMATIVE AND OTHER DEFENSES

9 All allegations not here before specifically admitted, denied, or modified, are hereby denied.  
10 For further and separate answer, Defendant alleges as follows:

## FIRST DEFENSE

12 The Court lacks jurisdiction over the subject matter of this action.

## SECOND DEFENSE

14 The complaint fails to state a claim against defendant upon which relief can be granted.

### THIRD DEFENSE

16 The complaint fails to state a claim upon which relief can be granted to the plaintiffs against the  
17 defendant under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671-2680), as averred in the  
18 complaint or otherwise, for the reason that if the defendant were a private person, it would not be liable  
19 to the plaintiffs in accordance with the law of the State of California.

## FOURTH DEFENSE

21 The plaintiffs are limited to recovery, if any, of the amount claimed administratively in  
22 accordance with 28 U.S.C. § 2675(b).

## FIFTH DEFENSE

24 Plaintiff's request for trial by jury is improper and barred by statute. [28 U.S.C. § 2402.]

## SIXTH DEFENSE

26 Plaintiff is not entitled to attorneys fees or pre-judgment interest under the facts of this case.  
27 [28 U.S.C. § 2674]

## SEVENTH DEFENSE

2 Defendant is entitled to an offset against damages, if any, for all monies paid to plaintiff by the  
3 United States as a result of plaintiff's injuries.

## EIGHTH DEFENSE

5 All future damages, if any, must be reduced to present value.

## NINTH DEFENSE

7 Income taxes must be deducted from all alleged past and future lost earnings, if any.

## TENTH DEFENSE

9 Proposition 51, California Civil Code § 1431.2, et seq. provides that "each defendant shall be  
10 liable only for the amount of non-economic damages allocated to the defendant in direct proportion to  
11 that defendant's percentage of fault. . . ." It further provides for apportionment of non-economic  
12 damages at the trial level. The United States, therefore, has no potential exposure to cross-complainants  
13 for any non-economic damages paid or settled by them in the underlying tort action, nor for any related  
14 expenses, costs or fees.

## ELEVENTH DEFENSE

16 Cal. Civ. Code, §3333.4 bars certain damages, including non-pecuniary damages, under the facts  
17 of this case.

## TWELFTH DEFENSE

19 The injuries and damages alleged by plaintiff were not proximately caused by a negligent or  
20 wrongful act or omission on the part of any employee, agent or officer of the United States of America.

## THIRTEENTH DEFENSE

22 Federal Agents, involved in this matter, acted in a justified manner and with reasonable force.

## FOURTEENTH DEFENSE

24 Plaintiff's claims are barred or diminished as a result of his failure to exercise reasonable care  
25 in mitigating his damages.

## FIFTEENTH DEFENSE

2 To the extent that they are sued in their individual capacity, all federal agents are entitled to  
3 qualified immunity from suit because they violated no clearly established constitutional or statutory  
4 right of plaintiff.

## SIXTEENTH DEFENSE

6 Federal Agents' actions were privileged under federal and state law.

## SEVENTEENTH DEFENSE

8       Federal Agents used only reasonable force and the force used was reasonably necessary under  
9 circumstances with which they were confronted.

## EIGHTEENTH DEFENSE

11 Plaintiff had knowledge of and voluntarily assumed the risk of all that transpired. Plaintiff's  
12 injuries, if any, arose out of such risk.

## NINETEENTH DEFENSE

14 Defendant was exercising due care while discharging a privileged law enforcement activity  
15 which he had no duty or authority to cease performing.

16 WHEREFORE, defendant prays that plaintiff take nothing by reason of his suit herein, that  
17 judgment be rendered in favor of said defendant, for costs of suit herein incurred, and for such other and  
18 further relief as this court may deem proper.

20 DATED: September 4, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

*s/*David B. Wallace  
DAVID B. WALLACE  
Assistant U.S. Attorney  
Email: [Dave.Wallace@usdoj.gov](mailto:Dave.Wallace@usdoj.gov)

Counsel for Defendant  
United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARIO ABELA-MCCANN, an individual,) Case No. 08cv1047-H-AJB  
Plaintiff, ) CERTIFICATE OF SERVICE  
v. )  
UNITED STATES OF AMERICA , )  
a Federal Government Entity, )  
Defendant. )

10 I, David B. Wallace, am a citizen of the United States and am at least eighteen years of age.  
11 My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

12 I am not a party to the above-entitled action. I have caused service of **Answer to Complaint**  
13 on the following parties by electronically filing the foregoing with the Clerk of the District Court using  
14 its ECF System, which electronically notifies them.

15 Donald A. Green, Esq.  
16 Doan Law Firm, LLP  
17 Attorneys at Law  
2850 Pio Pico Drive  
Suite D  
Carlsbad, California 92008

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 2008.

s/*David B. Wallace*  
DAVID B. WALLACE